

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Detroit Newspaper Agency, d/b/a Detroit Newspapers and Local Union 13N, Graphic Communications International Union, AFL-CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO; Local No. 372, International Brotherhood of Teamsters, AFL-CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO and Local No. 372, International Brotherhood of Teamsters, AFL-CIO and Newspaper Guild of Detroit Local 22, the Newspaper Guild and Detroit Typographical Union No. 18, Communications Workers of America and The Detroit News, Inc., and Newspaper Guild of Detroit, Local 22, The Newspaper Guild, and The Detroit Free Press and Newspaper Guild of Detroit, Local 22, The Newspaper Guild. Cases 7-CA-38079, 7-CA-38260, 7-CA-38320, 7-CA-38321, 7-CA-38322, 7-CA-38347, 7-CA-38393, 7-CA-38457, 7-CA-39008, 7-CA-39119, 7-CA-39401, 7-CA-39523, 7-CA-38081, 7-CA-38118, 7-CA-39596, 7-CA-38313, 7-CA-38812, 7-CA-39105 7-CA-39435, 7-CA-39436, 7-CA-39550, 7-CA-39570, 7-CA-39574, 7-CA-39593, 7-CA-39594, 7-CA-39850, 7-CA-40008, 7-CA-38367, 7-CA-38487, 7-CA-38545, 7-CA-38552, 7-CA-38706, 7-CA-39396, 7-CA-39548, 7-CA-39597, 7-CA-39813, 7-CA-39966, 7-CA-40086, 7-CA-40226, 7-CA-38509, 7-CA-39894, 7-CA-39549, 7-CA-39610, 7-CA-39901, 7-CA-38216, 7-CA-38338, 7-CA-39118, 7-CA-39377, 7-CA-39525, 7-CA-39895, 7-CA-40024, 7-CA-40118, 7-CA-40283, 7-CA-39526

December 16, 2004

ORDER GRANTING MOTION FOR RECONSIDERATION

BY MEMBERS LIEBMAN, SCHAUMLER, AND WALSH

On June 30, 2004, the National Labor Relations Board issued a Decision and Order in this proceeding finding, in relevant part, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging a number of economic strikers, either without a good faith belief that they had committed strike misconduct or where the strikers had not in fact committed the acts relied upon for the

discharges.¹ *NLRB v. Burnup & Sims*, 379 U.S. 21, 22 (1964).

On July 14, 2004, the Charging Parties filed a Motion for Reconsideration. On July 29, 2004, the General Counsel filed his own Motion for Reconsideration. The Respondents Detroit News and Detroit Newspaper Agency filed oppositions to the motions.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has decided to grant the Motions for Reconsideration. Section 102.48(d)(1) of the Board's Rules and Regulations provides that a party may, because of "extraordinary circumstances," move for reconsideration of a Board decision, and that the moving party must "state with particularity the material error claimed." We agree with the contention of the General Counsel and the Charging Parties that the Board inadvertently made a material error with respect to the appropriate remedy and order for the unfair labor practices found. We correct our decision accordingly.

In ordering the remedy for the unlawful discharges, the Board stated that the discriminatees should be reinstated with backpay from the dates of their discharges, unless they had been permanently replaced before the Union made its unconditional offer to return to work in February 1997. In the latter event, the discriminatees would be afforded the rights of permanently replaced economic strikers under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

The General Counsel and the Charging Parties correctly argue that the Board erred in focusing on whether the discriminatees were permanently replaced before or after the Unions' unconditional offer to return, and not on whether they were lawfully permanently replaced before they were discharged. Thus, the Board inaccurately treated the discriminatees as merely economic strikers rather than as unlawfully discharged strikers. Unlawfully discharged strikers are entitled to reinstatement and backpay running from the dates of their discharges regardless of when, or even if, they made an unconditional offer to return to work. *Abilities and Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). If the strikers were lawfully permanently replaced² before they were discharged, however, their rights to reinstatement and backpay are contingent on the departure of the employees who replaced them. *Hormigonera Del Toa, Inc.*, 311 NLRB 956, 957-958 & fn. 3 (1993).

¹ 342 NLRB No. 24 (2004).

² I.e., replaced prior to making an unconditional offer to return to work.

Thus, under *Abilities and Goodwill* and *Hormigonera Del Toa, Inc.*, supra, the discriminatees' entitlement to reinstatement and backpay depends on whether they were lawfully permanently replaced before their unlawful discharges, or after. Specifically: (1) if a striker is unlawfully discharged and *then* permanently replaced, he is entitled to immediate reinstatement and backpay running from the date of the discharge (regardless of when, or if, he unconditionally offers to return to work); (2) if the striker is lawfully permanently replaced *before* being discharged, he is entitled to reinstatement upon the departure of his replacement, with backpay running from the date of the replacement's departure.³

In this case, the Board inadvertently provided an inaccurate discussion of the discriminatees' right to relief.⁴ We shall correct our Decision and Order accordingly.

Accordingly, we shall grant the Charging Parties' and General Counsel's motions and modify our Decision and Order as set out below.⁵

ORDER

The Charging Parties' and General Counsel's Motions for Reconsideration are granted. Accordingly, the Board's Decision and Order is modified, and the Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the last sentence in the first partial paragraph and the first and second full paragraphs on page 3 of the decision.

"Consequently, we revise the judge's recommended remedy and Order to grant the discriminatees the rights of unlawfully discharged economic strikers.

"Unlawfully discharged economic strikers are entitled to immediate reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, and to receive backpay running from the dates of their unlawful discharges until they are offered reinstatement, unless they were lawfully permanently

replaced before they were discharged. *Abilities and Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). Any discriminatees who were lawfully permanently replaced before they were unlawfully discharged are entitled to full reinstatement to their former positions on a nondiscriminatory basis either upon the departure of the permanent replacements or, if those positions no longer exist, to substantially equivalent positions, unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can show that it failed to offer reinstatement for legitimate and substantial business reasons. *Hormigonera Del Toa, Inc.*, 311 NLRB 956, 957-958 & fn. 3 (1993); *Rose Printing Co.*, 304 NLRB 1076 (1991). Such individuals are not owed backpay for any period of time in which their replacements continued in the employer's employ during the backpay period.

"In accordance with these principles, we shall order the Respondent to offer to reinstate Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier immediately to their former positions. In the event that Respondent lawfully permanently replaced any of them prior to their unlawful discharges, the Respondent shall place them on a preferential hiring list, based on seniority, or some other nondiscriminatory basis, for employment as jobs become available. The strikers shall be made whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."⁶

2. Substitute the following for paragraph 2(a):

"(a) Within 14 days from the date of this Order, offer Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not lawfully permanently replaced prior to their unlawful discharges, dismissing if necessary any replacements hired thereafter. If no employ-

³ *Hormigonera Del Toa, Inc.*, supra, 311 NLRB at 957 fn. 3. However, if he is permanently replaced *before* the discharge but *after* making an unconditional offer to return to work, the replacement is unlawful, and the discriminatee is again entitled to immediate reinstatement and full backpay.

⁴ In *Detroit Newspapers*, 340 NLRB No. 121 (2003) in which we used similar language, the relevant discharges occurred after the Union's unconditional offer to return in February 1997. In those circumstances, any striker who was replaced before the Union made its offer was necessarily replaced before he was discharged. Accordingly, we do not need to correct the remedy in that case.

⁵ Member Schaumber would not include Larry Skewarczynski in the below Order because he did not find his discharge unlawful in the earlier decision.

⁶ In regard to striker Anthony Edwards, Respondent DNA offered to reinstate him on April 23, 1996, but he refused. While Edwards was within his rights to reject this offer and continue his strike, his backpay should be tolled for the period between the offer of reinstatement and the date when the Respondent failed to offer him the reinstatement rights extended to the other returning strikers. See *Abilities and Goodwill*, 241 NLRB 27 fn. 5 (1979).

ment is available for the discriminatees, or if they were lawfully permanently replaced before being unlawfully discharged, they shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.”

3. Substitute the attached notice for that in the Decision and Order.

Dated, Washington, D.C. December 16, 2004

Wilma B. Liebman ,	Member
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Peter C. Schaumber,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking

employees, without an honest belief that they had engaged in serious misconduct, or where they had not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not lawfully permanently replaced before their unlawful discharges, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees, or if they were lawfully permanently replaced before being unlawfully discharged, WE WILL place them on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

WE WILL make Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Floyd Davis, Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Harry Thompson, and Mike Youngmeier, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DETROIT NEWSPAPER AGENCY D/B/A DETROIT
NEWSPAPERS